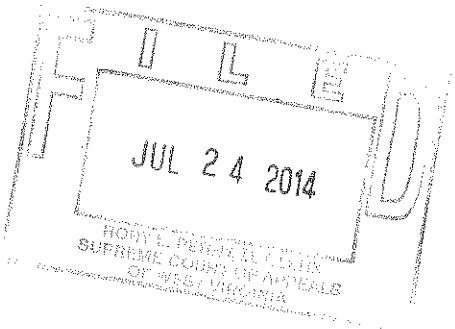
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0892



CAROL K.,
Appellant/Respondent Below,

vs.

TODD P.,
Appellee/Petitioner Below.

PETITIONER'S AMENDED BRIEF

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STATEMENT OF THE CASE

Factual Developments

The parties were married October 6, 2001; have two children; separated in July 2005; and the Final Order of divorce was entered on January 27, 2006. Amended Appendix Record at 13-21. A shared parenting plan was established, under which the mother had primary care of the children and the father would have the children most weekends during the school year; alternate weeks during the summer; and for "Schedule A holidays" otherwise. Settlement Agreement ¶ 3, Am. App. Rec. at 8, as incorporated into Final Order ¶ ¶ 13 & 21, Am. App. Rec. at 14 & 15. Child support of $719.35 per month was determined, to be paid by the father. Final Order ¶ 26, Am. App. Rec at 16.

At the time of divorce the parties held no real estate, Final Order ¶ 19, Am. App. Rec. at 15, the former marital home having been foreclosed upon prior to the completion of the divorce. Each party was to pay debts in their own names. Settlement Agreement ¶ 4.a., Am. App. Rec. at 8. The parties had divided all their marital personal possessions by agreement. Final Order ¶ ¶ 20 & 33, Am. App. Rec. at 15 & 17. Spousal support was waived by both parties. Final Order ¶ 18, Am. App. Rec. at 15.

A Settlement Agreement (hereinafter, "Agreement") prepared by respondent ex-

husband's attorney was incorporated by reference in Paragraph 32 of the Final Order. Am. App. Rec. at 17. In general, the Settlement Agreement provided that each party would claim one child as a tax dependent; the wife would pay accrued utility bills at the former marital residence; and that each party would pay their separate debts and hold the other harmless therefrom. Settlement Agreement, Am. App. Rec. at 8.

The only property item relevant to the present dispute concerned the husband's retirement account. The Settlement Agreement specified in paragraph 5:

> wife is entitled to ½ the marital portion of the TSP[1] - that is the portion that was contributed between October 6, 2001 and April 26, 2005. If she chooses to receive this money, then she shall be responsible for preparing the Qualified Order to receive the same.

Settlement Agreement ¶ 5.b.ii., Am. App. Rec. at 9. According to later calculations by the TSP Plan Administrator, the wife's share of the TSP based on these dates was determined to have been $4,081.51. Am. App. Rec. at 42.

Three years after entry of the divorce order, on January 14, 2009 respondent ex-husband withdrew all funds in the Thrift Savings Plan, including the portion agreed and ordered for distribution to the wife. Am. App. Rec. at 47. The total amount of the ex-husband's withdrawal was $15,297.19, of which respondent ex-husband received 12,237.75 after withholding of taxes. Am. App. Rec. at 47.

After another three years, wife's counsel submitted a "Retirement Benefits Court Order," entered by the Family Court on January 4, 2012, to implement the previously

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[1] "TSP" is an abbreviation for "Thrift Savings Plan."

agreed distribution of a portion of the Thrift Savings Plan. Am. App. Rec. at 22.[2]

After the entered Retirement Benefits Court Order was submitted to the TSP, the Plan Administrator notified the parties that the wife's share pursuant to the court order was $4,080.51. Letter of March 8, 2012, Am. App. Rec. at 42.

On May 8, 2012, the TSP Plan Administrator distributed the amount of $780.58 to petitioner Carol Kinsinger. Letter of May 8, 2012, Am. App. Rec. at 45.

After inquiry by the wife's counsel as to the discrepancy between the 'share amount' of $4,080.51 and the 'distributed amount' of $780.58,on April 19, 2013 the TSP Plan Administrator disclosed the full withdrawal made by the ex-husband some years earlier (on January 14, 2009). Letter of April 19, 2013, Am. App. Rec. at 47. The plan Administrator also noted that the ex-husband had "restarted his contributions on December 12, 2011." Am. App. Rec. at 47. The distribution of May 8, 2012 apparently represented the funds available in the TSP account following the resumed contributions.

Proceedings Below

Petitioner filed the present contempt proceeding with the Family Court of Mason County on November 5, 2012. Docket Sheet, Item 87; Am. App. Rec. at 82. An initial hearing was held February 11, 2013, after which the matter was held in abeyance "until further evidence concerning the history of the trust can be obtained from the parties." Order of March 25, 2013, Am. App. Rec. at 40.

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[2] The Amended Appendix Record does not show the date on which the proposed order, prepared by wife's counsel, was submitted to the Family Court for consideration. Upon information and belief, the proposed order was mailed to the Family Court on October 28, 2011.

Further hearing was held May 6, 2013, after which the Family Court declined to find the respondent ex-husband in contempt. The Family Court Judge ruled that "Petitioner [i.e., husband] is not in contempt, because the Respondent [i.e., wife] failed to act in a timely manner." ¶ 5, Order of June 7, 2013, Am. App. Rec. at 73. The Family Court made no finding as to whether any Prejudice was caused to the ex-husband's position due to the passage of time before the ex-wife submitted the "Retirement Benefits Court Order."

On petitioner ex-wife's appeal, the Circuit Court affirmed the Family Court ruling. Circuit Court Order of July 30, 2013, Am. App. Rec. at 1. Interpreting the Family Court findings "as an application of the laches doctrine," Am. App. Rec. at 4, the Circuit Court found "no abuse of discretion" in the Family Court's findings that the ex-wife "failed to timely satisfy the condition of the agreement." Circuit Court Order of July 30, 2013, Am. App. Rec. at 5. Further, the Circuit Court affirmed the ruling that the ex-husband was "not required to pay further sums...." Circuit Court Order of July 30, 2013, Am. App. Rec. at 5. Although reciting that Laches requires proof of "both lack of diligence ... and prejudice to the party asserting it," Am. App. Rec. at 4, the Circuit Court made no finding regarding Prejudice to the ex-husband's position caused by the passage of time before the ex-wife submitted the Retirement Benefits Court Order.

Appeal to this Court followed, seeking reversal of the application of the doctrine of Laches, and of the order extinguishing any further obligation by the ex-husband for the agreed marital property distribution under the Settlement Agreement and divorce Final Order.

SUMMARY OF ARGUMENT

1. "Laches is an equitable remedy which places the burden on the person asserting it to prove **both** lack of diligence by the party causing the delay **and** prejudice to the party asserting it." *Grose v. Grose*, 222 W. Va. 722, 728, 671 S.E.2d 727 (2008) (emphasis added). The lower courts focused exclusively on the first element of the doctrine, the amount of time which had passed. Neither court made any finding on the second element, of prejudice to the ex-husband's position caused by the passage of time. In fact, there was no particularized evidence presented by the ex-husband upon which a finding of Prejudice could have been made. The only hardship to the ex-husband was caused by his own inability to restrain himself from taking money he knew did not belong to him.

2. Alternative formulations, focusing either upon the conditional nature of the requirement to submit a "timely" QDRO, or a supposed "waiver" due to the passage of time, do not change the analysis. Under either variation, the essential question remains "How long is too long?" The equitable doctrine of Laches has developed historically to answer that question, and Laches requires proof of "prejudice caused by the delay." On the present record there is no prejudice to the ex-husband's position.

3. The underlying obligation established by the divorce Final Order and the Settlement Agreement of the parties, for equitable distribution of the marital portion of the retirement account, is not extinguished simply because the QDRO method of enforcement was unsuccessful. Because the doctrine of Laches was erroneously applied below, the underlying equitable distribution obligation is unimpaired. The ruling of the lower courts that the ex-husband "is not required to pay further sums" should be

reversed by this Court.

4. No legal analysis will restore the funds that were withdrawn from the retirement account and expended by the ex-husband. Petitioner asks this Court only to: (1) preserve her underlying judgment in the divorce order for the equitable distribution property amount (as already determined by the TSP Plan Administrator); and (2) permit her to pursue traditional judgment collection procedures on the underlying judgment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument would assist the Court in addressing the issues of this case, and that Rule 19 decision is appropriate.

ARGUMENT

I. Standard of Review

This Court's well-established standard of review of domestic relations proceedings was set forth in the syllabus of *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004):

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

See also Mark V. H. v. Dolores J. M., __ W. Va. __, 752 S.E.2d 409, 2013 W. Va. LEXIS 1306 (2013).

II. There Was No Finding Of, or Evidence Of, Prejudice to the Respondent Ex-Husband Caused by the Passage or Time. Therefore the Courts Below Erred in Applying the Doctrine of Laches.

A. The Doctrine of Laches Requires Proof of Both Lack of Diligence by the

Party Causing the Delay **and** Prejudice to the Party Asserting It

The issue of delay in asserting claims in the legal system is "How Long is Too Long?" This question has been addressed historically either by statutes of limitation as to claims on the Law side of the courts, or by the doctrine of Laches as to claims on the Equity side. There are distinctions between the two approaches.

"A statute of limitations is a creation by a lawmaking body to bar claims after a certain time period. It is a value judgment, marking when the interests in protecting colorable claims are overtaken by the interests in barring the prosecution of stale claims. Statutes of limitations serve a number of purposes: (1) they provide peace of mind to potential defendants by releasing them from the specter of potential liability; (2) they prevent fraud by barring the prosecution of claims on evidence that has been degraded or lost; (3) they enhance commercial intercourse by preventing the disruption of litigation; and (4) they test whether claims are meritorious by encouraging diligent prosecution." *Resetting the Doomsday Clock*:...., 6 Buff. Intellectual Prop. LJ133, 138 (Spring 2009). Application of the statute of limitations depends purely upon the running of time, without consideration of the underlying facts, circumstances and equities of the positions of the parties.

In general, where a statute of limitations applies, the doctrine of Laches will not be applied. "If the action was formerly cognizable at law, statute of limitations is the appropriate defense; if formerly cognizable in equity, laches applies." M. Lugar and L. Silverstein, *West Virginia Rules of Civil Procedure* 81 (1960), quoted at *Maynard v. Board of Ed.*, 178 W. Va. 53, 60, 357 S.E.2d 246, 254 (1987). *See also* Syl. Pt. 3, *Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E.2d 664 (1990) ("Statutes of limitations are

not applicable in equity to subjects of exclusively equitable cognizance."); and *Rodgers v. Rodgers, id.* 184 W. Va. at 88 fn. 5, 399 S.E.2d at 671 ("Where plaintiff's demand is purely a legal one, equity as a general rule follows the law literally in applying the statute of limitations."); and *Robinson v. McKinney*, 189 W. Va. 459, 462, 432 S.E.2d 543, 546 (1993).[3]

By contrast, the doctrine of Laches is "an equity doctrine to the effect that unreasonable delay will bar a claim if the delay is a prejudice to the defendant." Dobbs, "Handbook on the Law of Remedies" (West Publishing 1973). Long ago the United States Supreme Court stated that "laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, – an inequity founded upon some change in the condition or relations of the property or the parties." *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892). In 1928 the West Virginia Supreme Court stated, "Delay alone does not constitute laches; it is delay which places another at a disadvantage." Syl. Pt. 3, *Carter v. Carter*, 107 W. Va. 394, 148 S.E.2d 378 (1928). Again in 1950 this Court recognized that "time alone is not now considered a controlling factor in the application of the doctrine." *Hoffman v. Wheeling Svgs. & Loan Ass'n*, 133 W. Va. 694, 707, 57 S.E.2d 725, 732 (1950). Prior West Virginia case law had long held that "Delay alone does not constitute laches; it is delay which places another at a disadvantage." *Camden v. The Fink C. & C. Company*, 106 W. Va. 312,

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[3] "We agree with the mother that the ten-year statute of limitations set forth in W. Va. Code 38-3-18 [1923] applied in this case and not the doctrine of laches. ... Enforcement of such decretal judgment can be barred by the statute of limitations, but its enforcement may not be barred by laches." *Robinson v. McKinney*, 189 W. Va. 459, 462, 432 S.E.2d 543, 546 (1993).

316 145 S.E. 575 (1928), citing *Carter v. Price*, 85 W. Va. 744 (1920).

This Court has in more recent years frequently affirmed the same understanding of the doctrine of Laches. *See, e.g. Grose v. Grose*, 222 W. Va. 722, 728, 671 S.E.2d 727, 733 (2008) ("Laches is an equitable remedy which places the burden on the person asserting it to prove both lack of diligence by the party causing the delay *and prejudice to the party asserting it.*") (emphasis added); *State e rel. DHHR v. Carl Lee H.*, 196 W. Va. 369, 472 S.E.2d 815 (1996) (Syl. Pt. 4 "Mere delay will not bar relief in equity on the ground of laches."); *State ex rel. DHHR v. Robert Morris N.*, 195 W. Va. 759, 466 S.E.2d 827 (1995) (Syl. Pt. 4, same); *Rodgers v. Rodgers*, 184 W. Va. 82, 89 399 S.E.2d 664, 671 (1990) ("It is clear that delay itself in bringing the suit will not bar [sic] laches"); *Maynard v. Board of Ed.*, 178 W. Va. 53, 60, 357 S.E.2d 246, 253 (1987) ("[T]he controlling element of the equitable defense of laches is prejudice, rather than the amount of time which has elapsed without asserting a known right or claim"); Syl. Pt. 4, *Laurie V. Thomas*, 170 W. Va. 276, 294 S.E.2d 78 (1982) ("The general rule in equity is that mere lapse of time, unaccompanied by circumstances which create a presumption that the right has been abandoned, does not constitute laches.").

Grose v. Grose, 222 W. Va. 722, 671 S.E.2d 727 (2008) is particularly illuminating. In a 1990 equitable distribution order, the ex-wife was awarded a share of the husband's retirement benefits. The husband was then 49 years old, and would not qualify for full retirement benefits until reaching age 62. Shortly after the divorce proceedings the ex-husband was injured in a mining accident, and began receiving monthly disability benefits on the same account. It was thus unclear when he reached

age 62 whether the monthly benefit payments he was receiving from the account would be treated as either "retirement" or "disability" or some mix thereof.

The ex-wife filed a petition for accounting and QDRO 16 years after the equitable distribution order (and 3 years after the ex-husband turned 62). The *Grose* court ultimately permitted the ex-wife to receive a share of benefits paid on or after the date she filed her action. The 16 year passage of time between the equitable distribution order and the QDRO did not bar her from submitting the QDRO and obtaining benefits.[4]

Other states have also recognized that mere passage of time, even lengthy periods, is not sufficient to establish Laches in the assertion of QDRO rights. *Denaro v. Denaro*, 84 A.D. 3d 1148 (NY App. Div., 2nd 2011) (13 years between divorce order and QDRO proceeding); *Reiss v. Reiss*, 118 S.W.3d 439, 442 (TX 2003) (18 years between divorce order and QDRO proceeding).

B. Definition of Prejudice in the Laches Context

Two conceptual types of Prejudice for application of Laches have been identified: "Evidentiary Prejudice," and "Expectations-Based Prejudice." *See, Petrella v. Metro Goldwyn-Mayer, Inc.*, 695 F.3d 946, 953 (9th Cir. 2012). Evidentiary Prejudice recognizes changes which impair a defendant's ability to present or litigate his claim,

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[4] The *Grose* court did, however, uphold the application of Laches to bar the ex-wife from seeking a share of the monthly benefits which had already been paid to the ex-husband before the ex-wife filed her request for QDRO.

There is a major distinction between *Grose* and the present case. In *Grose*, the ex-husband did nothing to affirmatively violate the ex-wife's property interests. He apparently never took any early withdrawal of benefits, and received only his regular monthly payment. In contrast, in the present case the ex-husband took all the assets in a lump sum withdrawal years before his retirement age, understanding (by his own admission) that some of them belonged to his ex-wife. *See* ex-husband's testimony of May 6, 2013, at Am. App. Rec. 61.

such as the death of witnesses or loss of evidence. Expectations-Based Prejudice recognizes changes where a defendant "took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly." *Id.*[5]

Several of this Court's more recent Laches cases have turned upon Evidentiary Prejudice, and whether the delay impaired the defendant's ability to present his claim or defense. *See, e.g., Laurie v. Thomas*, 170 W. Va. 276, 294 S.E.2d 78 (1982) (suit seeking to rescind a deed on allegation of fraud); *Rodgers v. Rodgers,* 184 W. Va. 82, 399 S.E.2d 664 (1990) (suit to challenge estate and determine ownership of shares of stock); or *Grose v. Grose*, 222 W. Va. 722, 671 S.E.2d 727 (2008) (suit to determine portion of pension that represented marital asset). But it is important to recognize the difference between delay in litigating an otherwise inchoate or uncertain claim, and presentation of an established obligation. "Mere forbearance to compel rendition of a just debt or other right, the existence of which is clear beyond doubt, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay." Syl. Pt. 9, *Depue v. Miller*, 65 W. Va. 120, 64 S.E. 740 (1909). "Unless accompanied by circumstances ... such as makes the transaction out of which the claim is said to have arisen obscure, or renders it difficult, if not impossible, to produce

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[5] In Syl. Pt. 2, *Carter v. Price*, 85 W. Va. 744 (1920) this Court described examples of both types of Prejudice. "The death of witnesses by whom the truth of the situation could be proven" would be Evidentiary Prejudice. Expectations-Based Prejudice was exemplified as follows: "[B]ecause injury might result to him on account of expenditures made upon the land in the way of improvements, or where no claim is asserted until after the land has grown in value, either because of the development of territory or the discovery of valuable minerals thereon, and such delay in asserting such claim is so long as to lead to the belief that it is asserted largely because of the increased value of the land and altered conditions." Syl. Pt. 2, *Carter v. Price*, 85 W. Va. 744 (1920).

evidence to defeat the claim and thereby prevent injustice, the mere postponement of the assertion of a claim does not ordinarily warrant refusal of relief in equity." *Browning v. Browning*, 85 W. Va. 46, 50, 100 S.E. 860 (1919).

Hartley v. Ungvari, 173 W. Va. 583, 318 S.E.2d 634 (1984) (suit to establish child support amount) represents an example of Expectations-Based Prejudice. The ex-wife delayed in filing a suit for child support for some 9 years, even though the ex-husband frequently visited the state during those years and was amenable to service of process, frequently visited the children, and in fact provided financial and in-kind support for the children throughout. The Court found that the defendant during those years of visits had re-married, established a new family, bought a house and incurred substantial debt in doing so, in the expectation that the visits and support he was providing was adequate. Had the ex-wife timely pursued the Child Support claim, the defendant could have conformed his financial affairs to meet the obligation. Her failure to do so created a reasonable expectation on the ex-husband's part that the visits and support he was providing was adequate.

C. The Courts Below Failed To Make Any Finding of Harm or Prejudice To the Ex-Husband

The Family Court order, entered June 6, 2013, contains no finding or language identifying any harm, prejudice or disadvantage to the ex-husband accruing from the ex-wife's delay in submission of the QDRO. There are seven findings of fact; none of them mention the ex-husband's circumstances at all. The focus is entirely upon the ex-wife's delay and "responsibility to prepare the Qualified Domestic Relations Order (QDRO) if she chose to do so." Finding of Fact ¶ 5, Family Court Order of June 6,

2013, Am. App. Rec. at 72.

There are seven Conclusions of Law in the Family Court order; none of them identified any prejudice to the ex-husband. While stating "the petitioner [i.e., husband] could not be expected to wait an eternity to see if the Respondent was choosing to receive the money," Conclusion of Law ¶ 4, Family Court Order of June 6, 2013, Am. App. Rec. at 73, the Family Court did not identify any particularized harm or prejudice which had been caused.

The Circuit Court's appeal ruling also wholly failed to identify any harm or prejudice to the ex-husband. The Circuit Court interpreted the Family Court's ruling as an application of the Laches doctrine, and even quoted the correct standard that Laches "places the burden on the person asserting it to prove both lack of diligence by the party causing the delay and prejudice to the party asserting it." Circuit Court Order of July 29, 2013 at 4th page, Am. App. Rec. At 4.[6] The Circuit Court, however, then focused solely upon the passage of time: "The Appellant/Respondent failed to timely satisfy the condition of the settlement agreement and has made no allegation that she was misled or unable to fulfill her duty. As a result thereof, this Court finds no abuse of

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[6] The Circuit Court, oversimplifying the *Grose* case, said that in *Grose* this Court "found no error in the application of the laches doctrine in divorce proceedings regarding retirement benefits and the date of entry of a QDRO under the facts presented therein." Circuit Court Order of July 29, 2013, 4th page, Am. App. Rec. at 4. But as noted above, Amended Brief at 10, a 16 year passage of time in *Grose* did not bar the ex-wife's QDRO claim for a share of payments paid after the date she filed her QDRO. Laches was held applicable only to bar a retroactive claim to a share of regular monthly benefits paid before the date of the ex-wife's petition.

And as noted previously, Amended Brief at footnote 4, the Circuit Court also failed to distinguish the *Grose* ex-husband's ordinary monthly receipt of benefits in the regular administration of his retirement plan from Mr. Pethel's lump sum withdrawal of all the dollars in the retirement account.

discretion in the family court's finding...." Circuit Court Order of July 29, 2013 at 5th page, Am. App. Rec. At 5. There is absolutely no discussion of or identification of "disadvantage to another" or "prejudice to the party asserting" Laches, as required by the very case cited by the Circuit Court.

West Virginia law requires a finding of Prejudice to the party seeking the benefit of the defense of Laches. Neither of the lower courts made any finding of Prejudice whatsoever. Therefore the decisions of the lower courts are erroneous.

D. There Is No Evidence in the Record upon Which a Finding of Prejudice Could Have Been Founded

1. Introduction

At the hearing of May 6, 2013, the Family Court received evidence regarding, *inter alia*, the ex-husband's circumstances.[7] The gist of the appellant ex-wife's case was simply that the Final Order made an equitable division award of a share of the retirement plan, and that the ex-husband had withdrawn ALL the assets from that account on January 13, 2009. *See* Letter of April 19, 2013 from Thrift Savings Plan, submitted in evidence at the May 6, 2013 hearing, Am. App. Rec. at 47. The ex-husband acknowledged in cross examination that he "understood that [he] owed Ms. Kinsinger one half of the TSP savings account" when he withdrew all the money. Am. App. Rec. at 61. The wife asserted that the husband's act of cashing out the entire

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[7] Two hearings were conducted by the Family Court in this matter. The first, on February 11, 2013, was continued by the Family Court Judge because neither party had adequate information regarding the dollar amounts that were in the retirement account, or what had happened to the account. During the February 11, 2013 hearing, there was no testimony or evidence by the ex-husband regarding his circumstances at the time he emptied the retirement account. See Am. App. Rec. at 26 - 39.

balance of the retirement account in 2009 was wrongful.[8]

The ex-husband's primary response was his opinion that by 2009 his ex-wife had waited too long to submit the QDRO, so he was entitled to take her money. See, e.g., Am. App. Rec. at 58, 60, 61-62, & 65. This testimony by itself is insufficient to establish laches, as this Court has repeatedly observed that "Mere delay will not bar relief in equity on the ground of laches." Syl. Pt. 4, *State e rel. DHHR v. Carl Lee H.*, 196 W. Va. 369, 472 S.E.2d 815 (1996).

The ex-husband also gave a number of reasons relating to the circumstances of the marriage and/or divorce itself. He claimed he shouldn't have to pay because the parties had actually lived together only "for one year of our marriage,"[9] Am. App. Rec. at 58; that "she never supported me when I got back from Iraq," Am. App. Rec. at 58; that "three weeks after I got back from Iraq I filed for divorce, she moved in with Danny Westmoreland, she left my house, I went into bankruptcy." Am. Ap. Rec. at 58. Even if true, those facts occurred before the ex-husband signed the Settlement Agreement prepared by his lawyer, and agreed to entry of the divorce order with the equitable division of the retirement account. None of those factors can constitute any basis for later repudiation of the equitable division award.

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[8] In essence the ex-wife's position is that the equitable distribution order places the ex-wife's share of assets into a constructive trust, to be held for her benefit. The ex-husband violated that constructive trust by raiding the assets that should have been protected for the ex-wife.

[9] The divorce order states the parties had two children, born 1996 and 2002. They were married in 2001, and separated in 2005. Petitioner apparently was referring to military service tours in Iraq, Am. App. Rec. At 58, but provided no information as to the dates of those tours or the exact times he was out of the martial home.

2. Evidentiary Prejudice

As to Evidentiary Prejudice, there was nothing the ex-husband could have asserted. The litigation had already been concluded. The Settlement Agreement and the Final Order of divorce had already defined the property rights of each party. No further evidence was needed to determine what property belonged to each party. There could have been no evidentiary prejudice to the ex-husband, because there was nothing further to litigate. *See* Syl. Pt. 9, *Depue v. Miller*, 65 W. Va. 120, 64 S.E. 740 (1909); and *Browning v. Browning*, 85 W. Va. 46, 50, 100 S.E. 860 (1919). In effect the assets awarded in the equitable distribution order should have been regarded as being held in a constructive trust for the ex-wife's benefit.

3. Expectations-Based Prejudice

The sole possibility would be Expectations-Based Prejudice, an assertion of some change of circumstances that would make it inequitable for the ex-husband to be liable for taking the assets previously awarded to the ex-wife. The ex-husband here made no claim of investment or expenditure in reliance upon the award of equitable distribution property rights. That sense of expectations-based prejudice cannot exist on these facts. He did not allege any change in his personal family circumstances, such as a remarriage as in *Hartley*. He made no claim of purchasing a house, or taking on other new financial obligations, as in *Hartley*.

As discussed previously,[10] in *Hartley v. Ungvari*, 173 W. Va. 583, 318 S.E.2d 634 (1984) this Court recognized expectations-based prejudice arising in a case seeking to

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[10] See Amended Brief at page 12 *supra*.

litigate for the first time the extent of a retroactive potential child support obligation, where the defendant "relied, in good faith, upon the appellee's inaction to the extent that his conditions have changed and he can no longer be restored to his former state." *Id.* 173 W. Va. at 588, 318 S.E.2d at 639. Those circumstances made it inequitable to permit the obligee to litigate a claim to set retroactive child support for the years before she returned to court.

In *Hartley*, the ex-husband took no action that was wrongful as to the ex-wife's property interests. He did not "hide out" from service of process, as he regularly visited his children. He did not refuse to pay anything to help, and in fact provided support for the children. At no time did he take from the ex-wife funds or assets which he knew belonged to her. He did not plead poverty, but only that while his ex-wife surreptitiously tried to accumulate a huge claim for back child support, he had lived a normal life, visited and supported his children, remarried, and bought a house.

By contrast, in the present case the ex-husband willfully and intentionally took money from the retirement account that he knew belonged to his ex-wife. He claimed he was justified in taking her money for his own personal benefit because he encountered "bad times." Am. App. Rec. at 58. If poverty and necessity become a defense to theft, this case will indeed bring a major change to the law.

4. <u>"Bad Times" Prejudice</u>

Even assuming "bad times back then" (at the time of his 2009 taking of his ex-wife's money) could justify the taking, in the present case the ex-husband utterly failed to provide any particularized information on which a finding of "bad times" Prejudice in 2009 could rest. He provided no actual evidence or description of his bad times. For

example, what precisely was his definition of "bad times"? Would his definition be accepted by this Court to invoke Laches?[11] Were the "bad times" the result of his own fault or misconduct?[12] When did the "bad times" begin?[13] How long did his "bad times" last? Did he have any actual income during the "bad times," from employment or insurance or Veteran's Benefits or unemployment compensation or public assistance? There is no evidence in the record from which a court could answer any of these questions.

The ex-husband referred to a bankruptcy, Am. App. Rec. at 58 and 60, but did not provide the Family Court with any information to show when this had happened. Was the bankruptcy taken at the time of the original divorce when the equitable distribution was agreed?[14] Or after the divorce but years before he took all the money out of the retirement account? Or years after he took the money from the retirement account? None of these things are known, because the ex-husband failed to provide

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[11] Were these medical problems? Relationship problems? Loss of employment? Was his income totally eliminated, or only reduced and if so by how much? What other financial resources did he have to draw upon? What other family did he have to draw upon? Did he qualify for unemployment compensation, disability benefits, or some other public assistance?

[12] If loss of employment, what caused him to lose his job - voluntary quit, misconduct or other fault attributable to him? Or layoff by a stressed employer, not attributable to him?

[13] Before or after he emptied the account? A week before? A month before? A year before? What other financial resources existed, and were they exhausted before he took his ex-wife's share of the account?

[14] The ex-husband's testimony indicated the bankruptcy was taken soon after "I got back from Iraq, I filed for divorce, she moved in with Danny Westmoreland, she left my house I went into bankruptcy." Am. App. Rec. at 58.

any particularized evidence.

The ex-husband also attempted to offer a "bad times now" justification for why he should not now have to pay to replace the money he took in 2009. But again, there was no particularized evidence. After stating he had started working for the Army Corps of Engineers in December 2011, Am. App. Rec. at 56, the ex-husband then asserted in the May 2013 hearing that "I'm unemployed right now, I don't have any money on me...." Am. App. Rec. at 58. He provided no information as to the amount of income while he was employed; the duration of the recent unemployment; any unemployment compensation benefits he may have then been receiving; or the cause of his most recent unemployment.[15]

To obtain equity, the ex-husband must show he comes to equity with clean hands. He failed to make any actual evidentiary showing of circumstances which compelled him in 2009 to take money from the retirement account that he knew did not belong to him. He failed to make any particularized evidentiary showing of circumstances in 2013 which should excuse him from responsibility for what he did in 2009.

For all of these reasons, the evidence of record is insufficient to establish the element of "Prejudice" to the ex-husband caused by the ex-wife's delay in presenting a QDRO. The obligation had been litigated, and was well established. He acknowledged in his own testimony that he knew a part of the retirement account belonged to his ex-wife. Am. App. Rec. at 61. The only justification he offered was that he encountered

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[15] E.g., whether he was unemployed by no fault of his own, or due to voluntary quit or misconduct.

"bad times" so he should be able to take his ex-wife's assets. The only "prejudice" to the ex-husband on this record was his own inability to keep his hands off property that didn't belong to him.

E. Alternate formulations of the "How Long Is Too Long" Question, Such As Waiver or Conditionality, Do Not Change the Analysis

1. Waiver

Some descriptions of the Laches doctrine include language suggesting Passage of Time alone might be sufficient to evidence Waiver of rights. "It has been defined as such neglect as leads to a presumption that the party has abandoned his claim and declines to assert his right." *Hoffman v. Wheeling Svgs & Loan Ass'n,* 133 W. Va. 694, 707, 57 S.E.2d 725, 733 (1950). "If ... no injury or prejudice to the defendant has resulted from the delay, ... the cause of action is not barred by laches, unless the lapse of time and the circumstances are such as to raise a presumption of intent, on the part of the plaintiff, to abandon or relinquish the right." Syl. Pt. 5, *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956). "Laches is a delay in the assertion of a known right which works to the disadvantage of another, *or such delay as will warrant the presumption that the party has waived his right.*" *Grose v. Grose*, 222 W. Va. 722, 728, 671 S.E.2d 727, 733 (2008) (emphasis added).

Appellant suggests, however, that these formulations do not answer the "How Long is Too Long" question; they merely restate it.

To establish Waiver, there must be "voluntary intention to relinquish." *Hoffman v. Wheeling Svgs & Loan Ass'n,* 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950). "The burden of proof to establish waiver is on the party claiming the benefit of such waiver,

and is never presumed." *Id.* at 133 W. Va. 694, 713, 57 S.E.2d 725, 735. "A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights. [citation omitted]." *Id.* at 133 W. Va. 694, 713, 57 S.E.2d 725, 735.

This Court summarized in *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998) the law against any presumption of waiver:

> [T]o establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right. See also *Dye v. Pennsylvania Cas. Co.*, 128 W. Va. 112, 118, 35 S.E.2d 865, 868 (1945) ("'Waiver is the voluntary relinquishment of a known right'." (citation omitted)). This intentional relinquishment, or waiver, may be expressed or implied. *Ara* at 269, 387 S.E.2d at 323 ("Waiver may be established by express conduct or impliedly, through inconsistent actions." (citing *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 119 S.E.2d 336, 339 (1961))). However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right. *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) ("'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights." (Citation omitted)). Furthermore, "the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." Id. (citing *Hamilton v. Republic Cas. Co.*, 102 W. Va. 32, 135 S.E. 259 [(1926)]). See also *Mundy v. Arcuri*, 165 W. Va. 128, 131, 267 S.E.2d 454, 457 (1980) ("One who asserts waiver . . . has the burden of proving it." (Citations omitted)); 19 *Michie's Jurisprudence* Waiver § 5 at 678 (1991) ("The burden of proof is on the one asserting a waiver.").

Potesta v. U.S. Fidelity & Guar. Co., 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998)

On the record below, the ex-husband did not produce any fact indicating the ex-wife's intention to waive her property interest other than the passage of time. He did not allege any statement or action by the ex-wife demonstrating a knowing and

voluntary purpose to waive or release her adjudicated right to the retirement account assets. He did not provide evidence of any communication by the ex-wife from which an intent to waive her property right could be found.

Again, it is important that this was not a case to litigate an uncertain claim. "Mere forbearance to compel rendition of a just debt or other right, the existence of which is clear beyond doubt, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay." Syl. Pt. 9, *Depue v. Miller*, 65 W. Va. 120, 64 S.E. 740 (1909). *See also Browning v. Browning*, 85 W. Va. 46, 50, 100 S.E. 860 (1919). Here the "claim" had already been litigated and resolved. The ex-wife's property rights were known and certain. The delay was not in the establishment of the claim, but in collecting the funds awarded as a result of the claim. "If no substantial obstruction probably will appear to defeat a fair investigation of the merits of the claim preferred, and a just ascertainment of the rights of the parties with respect thereto, the doctrine of laches does not apply." *Browning, id.*, 85 W. Va. at 50.

In the end, the Waiver argument underlying the lower court decisions here was to answer the "How Long is Too Long" question by simply asserting "six years," without underlying logic or rationale to explain the conclusion. That apparently was the view of the Family Court, which stated simply that "petitioner could not be expected to wait an eternity." Family Court Order of June 6, 2013, Am. App. Rec. at 73. But that simplistic view is insufficient where the claim had already been litigated and reduced to certainty; where there was no showing or harm or prejudice to the ex-husband; and where there was no evidence of intent to waive other than the mere passage of time.

To hold otherwise would introduce enormous uncertainty to otherwise settled

rights. How long is too long? If six years is too long, what about five? Or four? Or two? By what measuring stick will "too long" be defined in future? Litigants who have lost would be encouraged to take back assets at the first plausible length of time permitting them to argue that Waiver has occurred, thus renewing exactly the kind of litigation as has taken place in the present case over previously settled rights.

2. Conditionality

Both of the lower courts made much of the language in the Settlement Agreement that "If she chooses to receive the money, then she shall be responsible for preparing the Qualified Order to receive the same." ¶ 5.b.ii., Settlement Agreement, Am. App. Rec. at 9. But this is nothing more than a statement of the legal procedures necessary to complete the equitable distribution award. It adds no clarity to the 'How Long is Too Long' inquiry.

The federal Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that, *inter alia*, imposes fiduciary responsibilities upon those who manage and control plan assets. *See* US Department of Labor, "Employee Retirement Income Security Act - ERISA."[16] One of the responsibilities (and protections) established by ERISA is that "retirement plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign retirement benefits unless they are Qualified Domestic Relations Orders (QDROs)." US Department of Labor, "Qualified Domestic Relations Orders," citing ERISA §§ 206(d)(3)(B)(ii), 514(a), 514(b)(7).[17] A

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[16] Available online at: http://www.dol.gov/dol/topic/health-plans/erisa.htm

[17] Available online at: http://www.dol.gov/ebsa/faqs/faq_qdro.html

QDRO is "a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and that includes certain information and meets certain other requirements." *Id.*, citing ERISA § 206(d)(3)(B)(i).

So, as a matter of federal law, it is always true that where retirement assets are equitably distributed a separate QDRO must be entered. One party or the other must prepare a QDRO; usually that task is given to the party benefitting from the equitable distribution award, as here. The statement in the Settlement Agreement, drafted by the ex-husband's attorney, is simply (1) a statement of the law that a QDRO is needed, and (2) an agreement that the ex-wife would produce the QDRO for court consideration.

After that, the inquiry is, once again, how much time would have to pass to demonstrate that the ex-wife 'didn't choose to receive the money.' A different way of framing 'How Long is Too Long' doesn't answer the inquiry. The answer instead lies in the long established law of Laches, with its requirement of proof of harm or prejudice flowing from the passage of time.

III. Failure of a Qualified Domestic Relations Order to Obtain Full Payment Does Not Thereby Extinguish the Underlying Award of Equitable Distribution Property Rights

West Virginia law "favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts...". Id. at 88 citing Syl. Pt. 1, *Sanders v. Roselawn Memorial Gardens, Inc.* 152 W.Va. 91, 159 S.E.2d 784 (1968). *See also* authorities cited in *Schoolhouse Limited Liability Company v. Creekside Owners*

Association, __ W. Va. __, __ S.E.2d __, 2014 W. Va. LEXIS 559, at fn 10.

Courts in other jurisdictions have spoken to the finality and authority of the underlying Settlement Agreement as to distribution of retirement assets even where a QDRO was not entered until long after the divorce order was entered. The Texas Supreme Court, in a matter where a QDRO was filed 18 years after the divorce decree, stated the "QDRO serves its intended purpose of implementing the division of benefits and does not impermissibly 'amend, modify, alter, or change the division of property made or approved in the decree of divorce'." *Reiss v. Reiss*, 118 S.W.3d 439, 442 (TX 2003). Laches did not bar the 18-year delayed QDRO in that Texas case.

In a recent New York case where a QDRO was entered 13 years after the divorce order, the Court viewed the QDRO as a "motion to enforce the terms of a stipulation of a settlement." *Denaro v. Denaro*, 84 A.D. 3d 1148 (NY App. Div., 2nd 2011). The court there held first that "the statute of limitations does not bar issuance of the QDRO. '[M]otions to enforce the terms of a stipulation of settlement are not subject to statutes of limitation. [citations omitted]." *Denaro v. Denaro, id.* at 1149. The court characterized a QDRO as "a merely a mechanism to effectuate payment of a party's share in a retirement plan." *Id.* The *Denaro* court rejected a Laches claim, saying "The delay in submitting a QDRO for execution was certainly lengthy, but the defendant has not shown any prejudice to himself resulting from the plaintiff's delay." *Id.* at 1150. Finally, the *Denaro* court rejected the Waiver argument: "The plaintiff's delay in submitting the QDRO to the Supreme Court did not evince an intent to waive her rights. Waiver does not result from negligence, oversight, or inattention, and it may not be

inferred merely from silence. [Citations omitted]." *Id.* at 1150.

To return to the *Grose v. Grose* case, this Court held that a 16 year passage of time did not bar an ex-wife's QDRO claim upon payments to be paid after the date she filed her QDRO action. *Grose v. Grose*, 222 W. Va . 722, 728 (2008). The only portion of benefits protected by the Laches bar were those ordinary monthly payments received by the ex-husband after he reached qualifying retirement age but before the ex-wife filed her QDRO petition.[18]

In the present case the QDRO for the ex-wife's $4,080 share failed because the assets were depleted by the ex-husband's wrongful conduct. Although the doctrine of Laches does not apply, that legal conclusion will not change the fact that there is now no money in the account to satisfy the equitable division award. The issue becomes what remedy is available to the appellant ex-wife.

Appellant ex-wife asks this Court to hold that the underlying Equitable Distribution obligation set forth in the Settlement Agreement and Final Order is unimpaired by the failure of the enforcement mechanism of the QDRO. The Texas court noted that a QDRO does not 'amend, modify, alter, or change the division of property made or approved in the decree of divorce'." *Reiss v. Reiss*, 118 S.W.3d 439, 442 (TX 2003). In more general terms, an underlying debt or promissory note is not wiped out when a security instrument or enforcement mechanism is unavailing. The

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[18] If in the present case all the retirement account assets had been depleted simply by the ordinary payment of monthly benefits when the ex-husband reached qualifying age, then appellant ex-wife would have no claim. But that isn't the case. The retirement account assets in this case were depleted solely because the ex-husband took them all in a lump sum, for his own exclusive benefit, long before reaching retirement age, in disregard of the equitable distribution property award.

creditor may be left with less efficacious remedies than the security, but the creditor is not thereby stripped of the right to seek enforcement of her property.

Because the lower courts erroneously applied the doctrine of Laches, they also erroneously held that the ex-husband "is not required to pay the Respondent any additional sums." Conclusion of Law ¶ 6, Family Court Order of June 6, 2013, Am. App. Rec. at 73; and "Appellee/Petitioner [ex-husband] is not required to pay further sums to Appellant/Respondent." Circuit Court Order of July 29, 2013, 5th page, Am. App. Rec. at 5. This Court should reverse the application of the Laches defense, find that the underlying Equitable Distribution obligation in the amount of $4,080 is unimpaired, and permit the ex-wife to pursue any other judgment enforcement mechanism that may be available under the law.

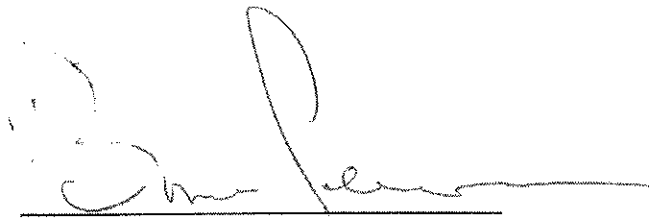
CONCLUSION

For the application of Laches, West Virginia law requires a showing of both (1) Passage of Time and (2) Prejudice or harm caused by the passage of time. *Grose v. Grose*, 222 W. Va. 722, 728, 671 S.E.2d 727 (2008). In a situation such as the present case, where the claim had already been litigated and the property rights defined, long established case law suggests it would be difficult to identify any such Prejudice. Syl. Pt. 9, *Depue v. Miller*, 65 W. Va. 120, 64 S.E. 740 (1909); *Browning v. Browning*, 85 W. Va. 46, 50, 100 S.E. 860 (1919). In fact, the courts below did not identify any harm or prejudice to the ex-husband by the passage of time, other than his own inability to keep his hands off his ex-wife's property. Further, the record does not contain any particularized evidence of Prejudice to the husband, beyond vague statements of his

"bad times" and consequent irresistible impulse to take what did not belong to him.

Appellant asks this Court to reverse the lower courts' application of the doctrine of Laches, and their consequent ruling the ex-husband owed no further payment to appellant. Appellant therefore asks this Court to find that the underlying Equitable Distribution award of $4,080.51, minus the $780.58 already paid, stands as an enforceable and unsatisfied judgment in the amount of $3,299.33.

CAROL K.
Appellant/Respondent Below
By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0892

CAROL K.,
Appellant/Respondent Below

vs.

TODD P.,
Appellee/Petitioner Below

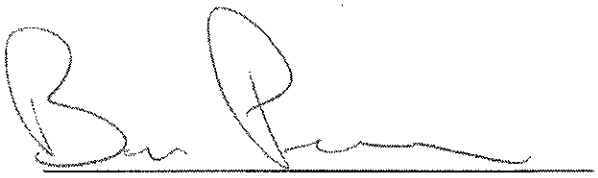
CERTIFICATE OF SERVICE

Certificate of Service

The undersigned hereby certifies that true and accurate copies of the foregoing "Motion for Leave to File Amended Appendix Record and Petitioner's Amended Brief," "Amended Appendix Record," and "Petitioner's Amended Brief" were served upon the defendant by depositing the same in the United States mail, first class postage prepaid, to the following address:

Mr. Todd Pethel
P.O. Box 373
New Haven, WV 25265

All of which was done on July 24, 2014



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